No. 80-1635

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ALEXANDER L. STE

In the Supreme Court of the United States

OCTOBER TERM, 1980

WESTINGHOUSE ELECTRIC CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence suports the Board's finding that petitioner violated Section 8(a)(1) and (3) of the National Labor Relations Act by singling out for disparate disciplinary treatment three employees solely because they held union office.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 2a-8a) is unreported. The decision and order of the National Labor Relations Board (Pet. App. 9a-33a) are reported at 243 N.L.R.B. No. 44.

JURISDICTION

The order of the court of appeals was issued on December 5, 1980. Petitioner's petition for rehearing and suggestion for rehearing en banc were denied on January 14, 1981 (Pet. App. 34a, 35a). The petition for a writ of certiorari was filed on March 30, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provision of the National Labor Relations Act is set forth at Pet. 7

STATEMENT

1. On November 3, 1977, Division Steward Slonaker—the ranking representative of the Union[1] at petitioner's Glassport, Pennsylvania plant—learned that petitioner's officials intended to discipline an employee for her assertedly "poor workmanship." Relying on petitioner's consistent past practice of permitting division stewards to attend employee disciplinary sessions, Slonaker asked Supervisor Readal to "let [him] know" when petitioner decided what disciplinary action would be taken. Readal ignored Slonaker's request for notice of the adverse action, held the disciplinary session in Slonaker's absence, and suspended the employee for three days. When Slonaker learned of the meeting and attempted to attend, Readal asserted that the matter was "none of [Slonaker's] business" and directed him to "get the hell out of here." (Pet. App. 15a-18a.)

The following morning, Slonaker asked Readal for contractually-guaranteed time off from his job as a company welder in order to prepare a grievance concerning the disciplinary action imposed on the employee.[2] Readal denied Slonaker's request—suggesting that one of Slonaker's subordinates could handle the matter—and directed

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[1]The International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC (Pet. App. 15a).

[2]Under the terms of petitioner's collective-bargaining agreement with the Union, upon request, stewards are permitted time off in order to deal with such matters, unless the steward's absence would cause "serious interference with operations," in which case company officials are nevertheless required to "make arrangements" for the steward to leave his job "as promptly as possible." In addition, the agreement requires the Union to reimburse petitioner for the steward's time away from his job. (Pet. App. 18a-19a, 20a n.13.)

Slonaker to begin work on a project for a specified customer.[3] Invoking his contractual right to a "prompt[]" replacement (see note 2, *supra*), Slonaker asked if Readal would make arrangements to have another welder take his place. Readal responded by directing Slonaker to "stay on [his] job" and stated that he would replace Slonaker when he "s[aw] fit." No effort to secure a replacement was made, and, when Slonaker attempted to assist his subordinates in preparing the grievance, he was threatened with "indefinite[]" suspension unless he returned to work. (Pet. App. 20a-21a; Tr. 1016-1017, 1177-1178.)[4]

Rumors circulated among petitioner's other first-shift employees regarding the suspension, Slonaker's expulsion from the disciplinary meeting, and petitioner's refusal to grant Slonaker time off to process the grievance. The employees met on the company parking lot during their lunch break. As they assembled, the employees began "shouting and hollering" and demanded an explanation of what had occurred. First-shift Stewards Pierce and Kurta attempted to quiet them down, and Slonaker began to explain the events of the preceding 24 hours. The employees repeatedly interrupted him with strident profanity and statements denouncing petitioner's treatment of their stewards. When Slonaker finished his account, several employees declared their intention not to return to work. Slonaker announced that the stewards were returning to the plant, and he, Pierce, and Kurta proceeded to do so. This angered

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[3]Petitioner states (Pet. 8) that Slonaker's assignment was made on an "emergency" basis. The administrative law judge found (Pet. App. 19a & nn.10-12, 22a n.14), however, that petitioner had received the job order in question five days before Slonaker's request and that petitioner had manifested "no sense of urgency" with respect to the project until Slonaker requested time off to prepare the grievance.

[4]"Tr." refers to the transcript of the hearing before the administrative law judge; "GCX" refers to the exhibits of the General Counsel.

the assembled employees, who remained in the parking lot and "vociferously protested" the action of the three stewards as they left. (Pet. App. 23a; Tr. 432-433, 614-616, 833.)

The stewards returned to the plant "ready to go to work"[5] and encountered Supervisor Anderson. Kurta told Anderson that the stewards "would like to get a meeting with management, to resolve this problem, and get the people back into the building." Anderson left and returned a few minutes later, informing the stewards that petitioner's plant manager "would not hold no meeting until the people come back to work." Company officials subsequently told the stewards that they had "a responsibility to get the people back to work." When Slonaker explained that he had "tried" to get the employees to return, but was "unable to do so," Supervisor Gilson derided the stewards and directed them to vacate the building if they did not "intend to go back to work." The stewards departed, and, by the time they reached the parking lot, virtually all of the first-shift employees had left petitioner's premises. (Pet. App. 23a-24a; Tr. 633, 784-785.)

Supervisor Gilson reported to petitioner's plant manager that Slonaker had said that he had unsuccessfully "tried to get the employees back to work," but Gilson added that he thought that Slonaker and two rank-and-file employees (Murelli and Hutzler) had instigated the work stoppage (Pet. App. 24a). On the basis of this information, the plant manager decided to give one-day disciplinary suspensions to Murelli, Hutzler, and the rest of the rank and file, and three-day suspensions to Slonaker, Pierce, and Kurta—as well as to second-shift Stewards Shaver and Caputo and

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[5]Petitioner states (Pet. 9) that "[t]heir only purpose in returning was to confront management over the strike and to present the [employee] grievance * * *"; there is no record support for this assertion.

former Steward Piccini; Shaver, Caputo, and Piccini had not been present at the noon meeting (Pet. App. 15a, 24a-27a).

Shaver, who was on a "road job" about 50 miles from petitioner's plant, learned later that afternoon from his supervisor that the first-shift employees were engaged in a work stoppage. Nevertheless, Shaver and the other "road job" employees continued to work and finished their assigned shift (Pet. App. 25a). Steward Caputo had become ill at the end of his shift the previous evening and had made arrangements with company officials to take the following day off. At the time of the work stoppage, he was sick at home, about 17 miles from petitioner's plant. (Pet. App. 26a-27a & n.30.) Prior to his decision to give them three-day suspensions, the plant manager was informed that Shaver had continued work and that Caputo was at home ill (Pet. App. 25a-26a, 27a).

Employee Piccini had served as third-shift section steward, but had ceased to hold union office when that shift was abolished.[6] By the beginning of the second shift on the day of the work stoppage, Piccini and a majority of petitioner's second-shift employees were assembled in the parking lot. In the absence of the second-shift stewards,[7] the employees collectively agreed that they would not report to work that afternoon. In response, the plant manager decided to suspend each of the second-shift employees for one day, but gave Piccini a three-day furlough. When Piccini called the plant to determine why he had received a longer suspension than the other rank and file employees, a company official explained that "all the stewards got them." Piccini protested that he was no longer a steward, but the

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[6]The record does not indicate whether petitioner was ever formally apprised of this fact (Pet. App. 26a).

[7]As noted above, Steward Shaver was working on a "road job" and Steward Caputo was at home ill.

plant manager "just wouldn't listen" and refused to alter the punishment. (Pet. App. 26a.)

2. The administrative law judge found (Pet. App. 28a) that petitioner violated Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (3), by imposing disparate disciplinary treatment upon the six individuals who were, or were believed to be, union stewards.[8] With respect to this finding, petitioner contended (Pet. App. 27a) that the disparate treatment was justified because the stewards had "instigated and condoned the strike" and because they had failed to "assume leadership roles and take aggressive steps to prevent illegal work stoppages." The judge rejected (*ibid.*) this claim, noting that the only information the plant manager had concerning the "instigators" was that Slonaker, Murelli, and Hutzler were possible culprits and that Slonaker had said that he had attempted to prevent the strike. Petitioner's treatment of Slonaker and the five other individuals, who had not been identified as "instigators" at all, thus belied petitioner's claim. The judge concluded (Pet. App. 27a-28a) that the discipline of Shaver (who worked his full shift on the day of the strike) and Caputo (who was at home ill) made it "obvious" that the "sole reason" for the disciplinary action against the six discriminatees was the fact that they held—or were thought to hold—union office. Finally, the judge rejected (Pet. App. 28a) petitioner's argument that the disparate treatment was justified, in any event, because the

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[8]The administrative law judge also found (Pet. App. 18a, 22a) that petitioner violated Section 8(a)(1) and (5) of the Act, 29 U.S.C. 158(a)(1) and (5), by unilaterally changing its settled practice of permitting division stewards to attend employee disciplinary meetings and by refusing, in violation of its collective-bargaining agreement with the Union, to give Slonaker time off in order to process a grievance. The Board (Pet. App. 9a-10a) and the court of appeals (Pet. App. 3a) sustained these findings. Petitioner raises no issue with respect to them here (Pet. 9-10 nn.2-4).

stewards were bound by their union office to "assume leadership roles and take aggressive steps to prevent a work stoppage," citing the Board's decision in *Precision Castings Co., Division of Aurora Corp.*, 233 N.L.R.B. 183 (1977).[9]

The Board sustained (Pet. App. 9a-10a & n.3) the judge's findings of fact, agreeing that the six discriminatees received harsher penalties "solely because they held the position of steward."[10] The Board rejected (Pet. App. 10a n.3) as a pretext petitioner's claim that the disparate treatment "was based on [the] alleged failure by the stewards to urge other employees to return to work,[11]" pointing out that petitioner had "meted out severer discipline to stewards who were not even present at the plant during the work stoppage and that the other stewards "made a good-faith effort to get the striking employees to return to work." Accordingly, the Board concluded that petitioner had violated Section 8(a)(1) and (3) of the Act, and ordered petitioner, *inter alia*, to make the six discriminatees whole for any loss of earnings they suffered on account of the disparate treatment (Pet. App. 9a-10a, 28a, 30a-31a).

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[9]In *Precision Castings*, the Board held that disparate treatment of a union steward based upon an assertedly higher degree of contractual accountability constitutes—as a matter of law—discrimination on the basis of holding union office and thus violates Section 8(a)(1) and (3) of the Act.

[10]The Board also noted (Pet. App. 10 n.3) that Piccini was given more severe discipline solely because petitioner "believed" he was a steward.

[11]All four members concurred in this factual finding. Chairman Fanning and Member Jenkins also rejected (Pet. App. 10a n.3) petitioner's contention as a matter of law, citing *Precision Castings, supra*. Members Penello and Truesdale, however, concurred (Pet. App. 10a n.3) only in the finding of pretext and expressly disclaimed any reliance on *Precision Castings*. Accordingly, the rationale of that case (see note 9, *supra*) did not command a Board majority here, and the Board did not seek enforcement of its order on that ground in the court of appeals (Br. 26 n.21).

3. A divided court of appeals found (Pet. App. 3a) the Board's conclusion "supported by substantial evidence in the record taken as a whole" and issued (Pet. App. 2a-3a) a per curiam order, enforcing the Board's order in full.[12]

ARGUMENT

Petitioner asks the Court to grant certiorari in order to determine whether, contrary to the rule adopted by the Board in *Precision Castings* (see note 9, *supra*), "stronger discipline may be imposed on union officials for participating in an unlawful strike than is imposed on other striking employees" (Pet. 12).[13] That question is not presented on this record.

The plant manager testified (Pet. App. 27a) that he imposed longer suspensions on the stewards because they had "instigated and condoned the strike" and because they had failed to "assume leadership roles and take aggressive steps to prevent illegal work stoppages." The Board rejected (Pet. App. 10a n.3, 27a) those contentions as pretextual, and found that the "sole" reason for the more severe discipline was that the discriminatees held, or were thought to hold, union office. Moreover, two of the four members of

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[12]Judge McKinnon agreed (Pet. App. 6a) that the disparate treatment accorded to Shaver, Caputo, and Piccini was "improper," but concluded (*ibid.*) that Slonaker, Pierce, and Kurta could lawfully be "held to a higher standard and punished more severely than * * * a rank and file employee" because they had "voluntarily participated" in the work stoppage while holding union office. But see note 15, *infra*.

Petitioner seeks review only of that part of the court's order concerning the discipline of the three first-shift stewards—Slonaker, Pierce, and Kurta (Pet. 9 n.2, 10 n.4).

[13]Although petitioner characterizes the strike in this case as "unlawful," it was not prohibited by law. Rather, petitioner alleged that the strike was not protected by Section 7 of the Act, 29 U.S.C. 157, because it violated a no-strike agreement between petitioner and the Union. Since the General Counsel had not raised any question as to the nature of the strike, the Board did not decide whether the strike was in fact unprotected by the Act (Pet. App. 28a n.31).

the Board expressly disclaimed reliance on *Precision Castings* (see note 11, *supra*), and therefore the holding in that case is not at issue here. Accordingly, the only issue raised by the holding of the court of appeals is whether substantial evidence supports the Board's finding that three of the stewards—Slonaker, Pierce and Kurta—were disciplined more severely solely because they held union office.[14] Such a fact-bound issue does not warrant review by this Court. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

In any event, the evidence fully supports the Board's finding. As the record shows, Slonaker, Pierce, and Kurta in fact acted in good faith and attempted to *avert* the impending work stoppage.[15] Thus, when the first-shift employees expressed their intention not to return to work after the parking-lot meeting, Slonaker announced that he, Pierce, and Kurta were returning to the plant, and—notwithstanding the barrage of expletives—proceeded to do so. Indeed, before the plant manager decided to impose the disparate treatment upon these three, he had been informed by Supervisor Anderson that they had returned to the building and asked to meet with him "to resolve this problem, and get the people back into the building" (Pet. App. 23a)—a suggestion the plant manager summarily rejected. Moreover, the plant manager had also been informed by Supervisor Gilson that Slonaker *had* unsuccessfully "tried to get the employees back to work" (Pet. App. 24a). These facts—as well as the treatment accorded to the two stewards (Shaver and Caputo) who were not even present at the time of the strike—clearly support the

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[14]Petitioner has abandoned its challenge to the Board's finding with respect to the other three discriminatees (see note 12, *supra*).

[15]Indeed, Members Penello and Truesdale specifically found that they did not even "voluntarily" participate in the strike (Pet. App. 10a n.3).

Board's finding that Slonaker, Pierce, and Kurta were more severely disciplined *solely* because they held union office in violation of Section 8(a)(1) and (3). See generally *NLRB* v. *Great Dane Trailers*, 388 U.S. 26, 34-35 (1967).

Contrary to petitioner's assertion (Pet. 12-17), the court of appeals' decision enforcing the Board's order with respect to Slonaker, Kurta, and Pierce does not conflict with the decision of any other circuit. The cases petitioner cites permit disparate treatment of stewards who "induce" or "foment[]" unprotected strikes (*NLRB* v. *Armour-Dial, Inc.*, 638 F. 2d 51, 56 (8th Cir. 1981)), who fail to comply with express contractual commands to take "positive steps" to terminate such strikes (*Gould Inc.* v. *NLRB*, 612 F. 2d 728, 730, 733 (3d Cir. 1979)), or who voluntarily join other employees in such strikes and thus do not discharge their assertedly "higher responsibility" to management as union officials (*Indiana & Michigan Electric Co.* v. *NLRB*, 599 F. 2d 227, 230 (7th Cir. 1979)). As shown above, however, the Board found, and the court below agreed, that Slonaker, Kurta, and Pierce were disciplined more severely, not for instigating the work stoppage here or for failing to discharge any "higher responsibility" owed by union officials,[16] but merely because they held union office. Nothing in the cases relied on by petitioner sanctions disparate treatment for that reason, which would necessarily discourage participation in union activities as officers. See *NLRB* v. *Armour-Dial, Inc., supra*, 638 F. 2d at 54-55 ("It is axiomatic that an employer may not discipline an employee merely because he or she holds a union office"); see also *NLRB* v. *Great Dane Trailers, supra*, 388 U.S. at 34 ("the

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[16]The no-strike clause in petitioner's collective-bargaining agreement with the Union contains no provision requiring union officials to take "positive steps" to end a strike (GCX 16, at 4).

burden is upon the employer to establish that [the discriminatory action] was motivated by legitimate objectives"); *Indiana & Michigan Electric* v. *NLRB, supra,* 599 F. 2d at 230 n.6.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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